Supreme Court, U.S.
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No. 99-1246

In the
Supreme Court of the United States

DOLE FOOD COMPANY, INC.,
ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Introductory Statement

Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (hereinafter collectively referred to as "Dole"), have petitioned this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit, which reversed a judgment of the United States Court of International Trade. The referenced decisions are attached to the Petition.

Both the United States and the United States Department of Commerce ("the Federal Respondents"), on the one hand, and Maui Pineapple Co., Ltd. ("Maui"), on the other, have filed briefs in opposition, to which Dole now respectfully replies.[1]

The dispute at Bar concerns the application of the antidumping statutes, and in particular 19 U.S.C. § 1677b. Petitioners produce and sell canned pineapple juice in Thailand, which is exported to the United States. Respondent Maui, a U.S. company, filed an antidumping petition alleging that Dole and other Thai producers were selling pineapple juice in the United States at less than their cost of production. Obviously, in the course of investigating those allegations, one of the determinations the Federal Respondents were required to conduct was of the actual cost of production of pineapple juice in Thailand.

In the common manufacturing practice, a pineapple is the input for a process that results in the production of both canned pineapple fruit and also pineapple juice. The cost of the pineapple itself must somehow be apportioned between those two co-products. Given that, for various reasons, the apportionment formula actually employed by Dole on its

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[1] These are referenced below as "Fed. Opp." and "Maui Opp.," respectively.

books – although perfectly consistent with generally accepted accounting principles (GAAP) employed in Thailand – was an unacceptable basis for the calculation, the allocation had to be done in another way. There are only two logical possibilities for assigning input costs to co-products: in proportion either to inherent characteristics of the outputs (*e.g.*, their weight), or, according to extrinsic factors (such as their relative values). Petitioners argued that the former method is the only correct one as a matter both of logic and of law: of logic, because using a value-based algorithm for determining value is inherently circular, and of law, because a court of competent jurisdiction has definitively spoken on the issue. The Federal Respondents are defending the application by the Commerce Department of a value-based methodology.

Petitioners contend that the court below grievously erred by permitting a federal agency, when it is charged with construing a statute, to do so in a manner expressly prohibited by a binding judicial decision, according deference to such action in contravention of this Court's teaching in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While the "subject matter" of the case concerns the proper apportionment of raw material costs between co-products -- two commercially valuable outputs from a single manufacturing process – for the purpose of deriving a constructed cost of production, the matters at issue are substantially farther-reaching.

The Federal Respondents, in their cursory insistence that any interpretation of the law is entitled to respect simply because it has emerged from the executive branch of government, entirely miss the point, not only of what happened in the proceedings below, but of the jurisprudential issue at stake in this case. Maui, by contrast, appreciates the significance of the case, and makes a valiant effort to defend the indefensible, which ultimately, for the following reasons, fails.

1. The Federal Respondents Miss the Point: The Decision Below Extends Deference to Agency Action That Is Inconsistent with Binding Law.

Every case turns on its facts. Every case is unique. Yet as every law student learns, the key to the principle of stare decisis that lies at the heart of the common law is that judicial decisions encapsulate principles that may be abstracted from them. And the decision below, if allowed to stand, would be authority for a very radical and troubling principle indeed: that executive branch agencies may ignore binding instructions from the judiciary as to the proper interpretation of the statutes that they are charged by law to administer.

Petitioners have demonstrated to the Court that the interpretation of the antidumping statute applied by the Department of Commerce in this case, 19 U.S.C. § 1677b, directly contravened the binding judgment of the United States Court of Appeals for the Federal Circuit in *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992). For this reason, it is entitled to no deference. The Court of International Trade correctly struck it down, directing Commerce to apply a cost-apportionment methodology that was consistent with *IPSCO*; the Federal Circuit erred in reinstating the agency's disposition of the case.

In *IPSCO*, the court below was faced with the very same issue presented here: whether the value of coproducts resulting from the same initial manufacturing process must be done according to inherent characteristics of the products themselves, or by allocation in proportion to their resulting values. The decision issued by the court was not equivocal: it did not find that either solution would do, or that one was preferable but the other acceptable. Rather, it found that only one approach to this question is consistent with the underlying statute, which mandates that actual values be used to the extent

possible. The court wrote, in reversing a Court of International Trade invocation of a value-based system:

> Essentially, the trial court ordered an unreasonable circular methodology. The selling price of pipe became a basis for measuring the fairness of the selling price of pipe. **This circular reasoning contravened the express requirements of the statute** which set forth the cost of production as an independent standard for fair value.

965 F.2d at 1061 (emphasis added).

The *IPSCO* court held, therefore, that in interpreting and applying 19 U.S.C. § 1677b to situations in which input costs had to be divided between co-products to arrive at a constructed cost of production, the Department of Commerce had no choice, no discretion, and no latitude: it had to use a methodology based on physical characteristics, and could not legally use a system based on value. "In *IPSCO*,, the Federal Circuit found that a value-based allocation of costs to co-products violates the antidumping statute. *IPSCO*, 965 F.2d at 1061." *Asociación Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865, 881 (C.I.T. 1998).

And yet, in the case at Bar, the Commerce Department did **precisely** what was forbidden by *IPSCO*, and the Federal Circuit effectively upheld that unbridled exercise of executive discretion. It is this that raises the *Chevron* question, for an agency is not entitled to deference in its statutory construction, even in an area consigned to its "special expertise," *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996), when it acts in violation of a binding judicial instruction on how the law is to be applied properly. Any other conclusion is profoundly irreconcilable with fundamental principles of the government of this Nation, under which executive agencies are

answerable to the courts, and only the courts are the ultimate arbiters of what the law means.

The Federal Respondents, however, would ignore all that. To present their case that what happened below was in all respects unexceptionable, they misunderstand a key element of the actual proceedings below. They seem to suggest that the Department of Commerce had two choices from which to select in allocating the cost of a pineapple to the co-products of juice and canned fruit: the method actually employed by Dole in the accounting records of its Thai affiliate, or the value-based algorithm ultimately adopted by Commerce.

This is entirely inconsistent with the record: it is simply not what happened. This is not the choice Commerce confronted, nor does it reflect the position taken by Petitioners.

Everyone agreed that the apportionment formula used by Dole in its books, while entirely lawful, was not reflective of the actual cost of production of canned pineapple fruit. The use of Dole's records was therefore not an option: indeed, it was the fact that Petitioners' own formula was unhelpful that caused Commerce to employ a method for constructing a cost in the first place.[2]

The difference between Petitioners and the Federal Respondents is not that Dole wanted the Department to use Dole's formula and Commerce insisted on applying a constructed cost methodology. The difference is with respect to what kind of constructed cost methodology is consistent with the statute. And as to that, the Federal Circuit had spoken: only a weight-based allocation formula can be

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[2] Maui readily acknowledges this. *See* Maui Opp., at 5. Indeed, Maui's account of the proceedings below is entirely accurate, even if it does not support the conclusions and characterizations Maui would derive from it. *Id.*, at 1-6.

reconciled with the law. The choice was not between a nonsensical outcome (which would have been the result had Dole's figures been used) and a sensible if possibly imperfect one; it was between a method of constructing costs that had been held to be mandated by law, and one that had been held to be illegal and circular.

The Federal Respondents, by apparently contending that they had no choice but to use a value-based allocation formula, save straying even further from their statutory mandate, simply miss the point. The point remains that the erroneous methodology that the Department of Commerce used for apportioning the value of a common input between two co-products was the one specifically condemned as unlawful in a binding decision of the relevant circuit court. The agency determination based on that methodology was therefore entitled to no deference under *Chevron* and its progeny, and the court below committed fundamental error when it held otherwise. The decision below should therefore be reversed.

2. Maui Too Fails to Address the Key Issue

a. The Issue Before This Court Is of Great Significance.

Both Respondents have, not surprisingly, tried to frame this case as a matter of case-specific "factual complexity," if not of great obscurity impenetrable by judicial eyes, and therefore inappropriate for review by this Court. Maui Opp., pp. 9-12; Fed. Opp., pp. 9-10. They must take this approach, of course, because unless Respondents successfully advance a theory of dispositive "factual differences," binding judicial precedent – *IPSCO* -- mandates reversal of the Court of Appeals decision.

However, Respondents' constant reminders of just how complicated the antidumping laws are to no avail in distracting attention from the portents inherent in the decision

below. The gist of their argument, like the gravamen of the decision they defend, is that the goods at issue in this case -- pineapples -- are different from the goods at issue in *IPSCO* - steel pipe. Respondents aver that these differences are "material," although no coherent explanation for the materiality of the differences as they may affect the allocation of costs has been proffered. Maui Opp., pp. 17-19, Fed. Opp., pp. 9-10.

Maui acknowledges that agencies are bound by judicial precedent, as the D.C. Circuit taught in *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983), a case on which Petitioners place substantial reliance. The court in *Yellow Taxi* expressly accorded **no** deference to an agency's assessment of whether judicial precedent was applicable to the facts of a particular case. The case stands for a proposition very close to the opposite of the one for which Maui cites it. Under *Yellow Taxi*, the determination whether a judicial decision is binding on an agency us ultimately for the courts, and the agency's answer to that question is not dispositive.

Yet Maui seeks to avoid the application of *Yellow Taxi* to the present case by arguing that in that case, the facts were "not materially distinguishable" from the facts of the earlier, binding decision." Maui Opp., p. 18. Yet in *Yellow Taxi*, the NLRB engaged in precisely the same exercise as the Federal Respondents did here: they attempted to distinguish precedent on the basis of allegedly material differences in the facts. *Yellow Taxi*, 721 F.2d at 373. The NLRB did not prevail in *Yellow Taxi*. For the same reasons, Respondents should not prevail here.

The issue before this Court is not whether pineapples and pipes are different: anyone who has ever enjoyed a piña colada (presumably including at least some members of this Court) can aver gratefully that they are. The issue is whether the differences between pineapples and pipes are relevant for determining whether a judicial decision applicable to one is

dispositive of a case concerning the other. A determination of that question depends not upon a comparison of the physical properties of tropical fruits with oil country tubular goods, but upon a proper analysis of the judicial decisions at issue. As has been noted, the appellate court's decision in *IPSCO* does not depend on metallurgy.

The answer was provided by Judge Bork in *Yellow Taxi*, by Judge Posner in *Nielsen Lithographing Co.*, 854 F.2d 1063, 1067 (7th Cir. 1988), and by the Ninth Circuit in *RLC Indus. Co. v. Commissioner*, 58 F.3d 413, 415-16: **Agencies are entitled to no deference when they interpret case law**. Indeed, the very case quoted in Maui's brief to support unbridled deference in the face of contrary authority actually produced the opposite result. In *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965 (3d Cir. 1979), the court **rejected** an agency's efforts to avoid the applicability of binding judicial precedent. *Allegheny Gen. Hosp.*, 608 F.2d at 969. The question of whether *IPSCO* applies to the present case was not for administrative resolution, but was a matter for the courts to decide. And the specialized court assigned that task – the Court of International Trade – determined, after careful analysis, that *IPSCO* does apply.

While *Chevron* requires courts to defer to agencies in their interpretation of their own statutes and regulations, it does **not** require courts to give deference to administrative interpretation of case law. Maui acknowledges, as it must, that *Chevron* is the basis for the decision of the court of appeals to the effect that the Department's view may not be challenged. Respondent taxes the trial court for according insufficient deference, supposedly in violation of this Court's instructions in *Chevron*. Maui Opp., p. 12. Yet what the Court of International Trade did was exactly correct: it told the agency over which it has oversight responsibility that it must follow the law, and it must adhere to binding judicial decisions.

b. Review by This Court is Necessary to Ensure That *Stare Decisis* is Respected in the Federal Circuit

It is of course true that the United States Court of Appeals for the Federal Circuit has appellate jurisdiction over cases brought before the Court of International Trade after being tried in the International Trade Administration of the Department of Commerce. Maui suggests that the only assurance of propriety needed is the fact of that court's involvement. But the court of appeals, even with its body of specialized expertise and experience, like the agency below, is not infallible. It has here misapplied the *Chevron* doctrine

Because of the factual complexity of the proceedings before any administrative agency in modern society, it will always be possible to invoke "material factual differences" to suggest that any case presented is recondite and unique, and thereby to distinguish precedent and seek to avoid the application of case law that the agency does not like. The court of appeals has in this case given the Department of Commerce its stamp of approval to do just that.

Parties subject to the exclusive jurisdiction of the Federal Circuit do not have the option of finding alternative venues. The benefits of inter-circuit non-acquiescence, elucidated in this Court's decision in *U.S. v. Mendoza*, 464 U.S. 154 (1983), do not apply in circuits of exclusive jurisdiction such as the Federal Circuit. For that reason too, Respondents' misreading of *Chevron* adopted by the court of appeals must be corrected by this Court.

Conclusion

For all of the foregoing reasons, as well as for those articulated in its Petition, Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd., respectfully submit that the decision of the United States Court of Appeals for the Federal Circuit below cries out for the intervention of this Court pursuant to Rule 10(a) and (c) of its

Rules, and they therefore pray that a writ of certiorari issue to that court so that its decision may be reversed.

Respectfully submitted,

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